BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GEORGE P. SMITH
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-155
Case No. 73-2351

S.S.A. No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision Nos. LA-SE-21044 and LA-SE-21045 which held that the claimant was eligible for unemployment insurance benefits to state employees under section 1453(a) of the Unemployment Insurance Code and that his claim effective January 28, 1973 should be backdated to August 13, 1972. We have considered the written argument submitted.

STATEMENT OF FACTS

The claimant first became employed by the State of California in the Department of Human Resources Development on November 17, 1970 as an Employment and Claims Assistant. Said classification provides for intermittent employment only according to the announcement of the California State Personnel Board applicable thereto:

> "Openings occur during periods of heavy work loads due to seasonal fluctuations in industry or agriculture, or due to changes in economic conditions. Appointments to this class will be made on a permanent basis; however, the work is of a part-time or seasonal nature. This means that Employment and Claims Assistants are expected to be available for work each year during the peak work load period on the call of the Department of Human Resources Development. This peak period usually occurs between October and April. This work may be for several hours a

day, several days a week or full time for anywhere from a few weeks to as much as 9 months each year. This type of employment, therefore, is not suitable for persons otherwise regularly employed or attending school. Appointments will be made preferably from residents in the community served by the local office. Those appointed must be available for work and willing to accept work under these conditions. This type of employment is not a normal method of entrance to full-time career employment security work. The class of Employment Security Trainee is the entrance class for a career in the Department of Human Resources Development."

From and after November 17, 1970 the claimant performed work for the Department of Human Resources Development in said classification on an intermittent basis and was employed by the Department in said classification as of the date of the referee hearing. The days to be worked were set out in a written schedule posted or sent out to employees of this classification advising them as to what days they would work. On certain occasions the schedule was amended orally by giving notice of changes therein.

The record contains a schedule of days on which the claimant performed services from August 13, 1972 to February 28, 1973. This schedule shows that the claimant worked every week during the period beginning August 13, 1972 through February 28, 1973, and his hours varied from seven hours to forty hours a week. His rate of pay was on an hourly basis and he received $3.84 per hour.

The claimant filed his claim effective January 28, 1973 because he had been advised that Employment and Claims Assistants who worked on an intermittent basis were entitled to file a claim. He requested that his claim be backdated because prior thereto he had been advised by the Department that he was not entitled to file a claim.

REASONS FOR DECISION

Chapter 5.5 entitled Unemployment Compensation for State Employees beginning with section 1451 of the Unemployment Insurance Code provides that a state employee

may be eligible for unemployment compensation benefits on certain terms and conditions.

The issue with which we are concerned in this case is whether the claimant is a "state employee" within the meaning of the code.

Section 1453(a) of the Unemployment Insurance Code provides that:

> "'State employee' means an individual who has permanent or probationary civil service status in employment by this state, and who (1) receives a notice of layoff with an effective date on or after March 1, 1971, pursuant to Article 2 (commencing with Section 19530) of Chapter 8 of Part 2 of Division 5 of Title 2 of the Government Code, or (2) terminates his employment, or has terminated his employment on or after March 1, 1971, after being notified in writing by his appointing authority that he is subject to layoff or mandatory transfer in his class and location, due to a reduction in staff arising from reductions in any budget act, or any other source of funds or due to a reduction in staff for reasons of economy or due to a reduction in staff resulting from organizational changes or reduced workload. However, nothing in this subdivision shall permit a state employee, as defined, to receive unemployment compensation benefits if he would be ineligible for or disqualified to receive such benefits under Article 1 (commencing with Section 1251) of Chapter 5 of Part 1 of Division 1."

In our opinion those portions of section 1453(a) designated as (1) and (2) are mutually exclusive. The provisions of (1) pertain to an individual who receives a "notice of layoff" and (2) pertains to an individual who "terminates his employment, or has terminated his employment on or after March 1, 1971, after being notified in writing by his appointing authority that he is subject to layoff or mandatory transfer in his class and location . . . ."

In the instant case the claimant contends that he is eligible for benefits as a "state employee" who has received a "notice of layoff."

Article 2 beginning with section 19530 of the Government Code is entitled "Layoff and Demotion." Section 19530 provides as follows:

> "Layoff, grounds. Whenever it is necessary because of lack of work or funds or whenever it is advisable in the interests of economy to reduce the staff of any State agency, the appointing power may lay off employees pursuant to this article and board rule."

Thus, it is obvious that the layoff of "state employees" must be pursuant to Article 2 and the State Personnel Board rules.

The Attorney General in Opinion No. 71-115, dated September 16, 1971 (54 Ops. Atty. Gen. 183) was directed to the question of whether, when there is a seasonal reduction in state employment and a resultant necessity to no longer retain certain permanent intermittent employees, must the decision as to which intermittent employees to retain be based on seniority. Much of the language in that opinion is appropriate to the issue in this case; namely, whether the claimant as a permanent intermittent employee received a notice of layoff within the meaning of the civil service laws governing layoffs. We quote from the analysis of that opinion:

> "Aside from the ordinary continuous full-time mode of employment, the State civil service statutes provide for various forms of less than continuous or full-time employment. One of these forms is denominated 'intermittent' employment. Gov. Code §§ 19100-19101. In describing this type of employment, section 19100 provides: 'Whenever the appointing power requires the appointment of a person to a position

requiring the performance of work on an intermittent or irregular time basis, the request for certification shall state the probable amount of working time to be required in the position. . . .'

"Section 19101 provides that: 'Eligibles shall be certified in accordance with their position on the appropriate list and their willingness to accept appointment to such position as "intermittent employees."' Thus, both the agency and the employee contemplate, at the outset, periodic intervals in the utilization of the employee's services as an inherent characteristic of this type of employment. (See 38 Ops. Cal. Atty. Gen. 86, 88 (1961), noting intermittent employees are in 'state service for an extended and indefinite period . . . though their service is broken.')

"Our concern here is the relationship between this type of employment and the civil service laws governing layoffs. Section 19530 provides that employees may be laid off 'whenever it is necessary because of lack of work or funds or whenever it is advisable in the interests of economy to reduce the staff of any state agency. . . .' Section 19533 provides, among other things, that: 'Layoff shall be made in accordance with the relative seniority of the employees in the class of layoff.' Thus, we come to our specific question: does this requirement of layoff pursuant to seniority apply to the periodic intervals in the employment of intermittent employees?

"As conceived in the civil service laws, the concept of layoff embodies these attributes:

"1. It is a form of separation from State civil service. § 19500.

"2. It is a nondisciplinary separation from State service. See § 19500 which designates layoff as a form of separation distinct from suspension or permanent removal for cause. And see § 19530 specifying lack of work, funds or the interests of economy, as the basis for layoffs.

"3. It involves a separation for reasons not contemplated upon the initial establishment or acceptance of the position. This statutory characteristic of a layoff is manifested in section 19540 which requires the agency to state in the notice of layoff to the employee 'the reason or reasons for the layoff.' See also State Personnel Board rule 455 (2 Cal. Admin. Code) which, in addition to the requirement of notification to the employee, also requires the agency to state the reasons for the layoff in a report to the State Personnel Board.

"While initially it might appear that the periodic intervals in employment inherent in 'intermittent employment' are in the nature of layoffs, upon analysis, it can be seen that the layoff concept, as formulated in the civil service statutes, is inapposite to such intervals which occur in the course of 'intermittent' employment.

"One of the significant distinctions between such intervals and layoffs is the fact that one's status as an employee continues during the nonwork periods, that is, he is not separated from State civil service to be reappointed upon the resumption of work. This factor is made apparent by comparing the provisions relating to intermittent employment with those establishing the status of 'limited term' employment. These latter provisions contemplate employment for a position which will not last beyond a specified period of time (not to exceed the probationary period). §§ 19080-19081. See also § 18530. Employees for such positions are those who have expressed willingness to accept such employment (§ 19081) and are selected from limited term lists (§§ 18532).

"Upon the expiration of the 'limited term' position, the employee is placed upon a 'preferred limited term list' which is 'a list of persons who have served under limited-term appointment and who . . . are granted eligibility for additional limited-term appointments.' (Emphasis added.) § 18532.1. See also §§ 19054, 19082.

"With respect to 'intermittent employees,' there are no similar provisions which, upon the break in employment, provide for the establishment of employment lists from which new 'appointments' are made when the intermittent work resumes. The intermittent employee's status as such is continuous though his 'service is broken.' 38 Ops. Cal. Atty. Gen., supra, at 88 (1961). And when the need arises, he is simply called back to work. He is not (as is the limited-term employee) re-'appointed' in the elaborate sense that the term is used in the statute. See §§ 19050 et seq. and 2 Cal. Admin. Code, § 251 et seq. specifying the procedures for 'appointment.' The status of an intermittent employee is thus somewhat analogous to a school teacher whose work and pay ceases during the summer months and who simply resumes work upon the commencement of the new term.

"Further indicating that the intermittent employment break is not comprehended in the term 'layoff,' as it is used in the statute, is the fact, as noted, that when the agency institutes a layoff, it must in a notice to the employee (§ 19540) and in a report to the agency (2 Cal. Admin. Code § 455), state the reason for the layoff. Such notice would seem devoid of any function in the case of the periodic work terminations which at the outset were contemplated both by the agency when offering the job (§ 19100) and by the employee when he accepted it (§ 19101).

"It is also noted that under the statute when one is subject to being 'laid off,' he has the option of electing to be demoted to a job in the same line of work or to a job he

previously held (§ 19535). This right to elect demotion in lieu of layoff would clearly appear to be inconsistent with an employment that is offered and accepted with the specific understanding that it will be subject to intermittent cessations.

"We, therefore, conclude that when the Legislature used the term 'layoff' in the civil service status, they did not intend that term to be applicable to the periodic work intervals inherent in the nature of 'intermittent' employment. Thus, the requirement that layoffs be according to seniority, is not applicable to the work intervals occuring during the course of intermittent employment.

"This is not to say, of course, that the layoff provisions are never applicable to intermittent employment. Our conclusions here are applicable only to the precontemplated intervals occuring during the course of such employment. If such employment is finally or indefinitely terminated due, for example, to the abolition of the position, then the layoff provisions would appear to be applicable.

"But while we conclude that the statute does not require seniority to govern the work intervals inherent in intermittent employment, the State Personnel Board does have the authority to devise by rule a system involving seniority which is applicable to the work interruptions characteristic of intermittent employment. §§ 19100, 19254.

"It is our understanding that such a system is presently under consideration and study by the Board."

In this case the claimant worked every week before and after the filing of his claim. His employment with the State of California was not terminated and he could reasonably expect to continue to work each week. Although the claimant did not work full time each week,

that is the nature of the employment to which he agreed as an intermittent employee. There certainly was no layoff here within the purview of section 1453(a) of the code.

In the instant case the claimant was regularly employed each week for a varying number of hours. However, there may be cases where, due to a reduction in staff arising from a reduction in funds or from organizational changes or a reduced workload, the interval between calls to work is extended or possibly there may be no call back to work for a period of several weeks or months. We believe the result must be the same in these cases.

Section 19540 of the Government Code provides:

> "§19540. Notice of layoff; election to accept layoff prior to effective date.
>
> "An employee compensated on a monthly basis shall be notified that he is to be laid off 15 days prior to the effective date of layoff. The notice of layoff shall be in writing and shall contain the reason or reasons for the layoff. An employee to be laid off may elect to accept such layoff prior to the effective date thereof."

Previous to the enactment of Chapter 5.5 of the Unemployment Insurance Code the legislature had resisted the passage of legislation which would provide unemployment insurance compensation for all state employees. When, due to a change of circumstances, state employment became less permanent than theretofore, the legislature then passed Chapter 5.5 of the code to grant unemployment compensation to a certain class of state employees.

Section 1453 of the code sets out the two methods of termination of employment whereby an individual may be considered a "state employee" and thus become entitled to unemployment insurance compensation benefits. Subdivision (1) thereof appears to fall within the purview of the first two sentences of section 19540 of the

Government Code and subdivision (2) appears to fall within the third and last sentence of that section.

The permanent intermittent employee is hired and accepts employment with the understanding that the nature of the employment is intermittent. He only reports for work as called, and his employment may cease by reason of failure to be recalled. However, as an hourly employee he is not included within section 19540 of the Government Code which provides for a written notice of layoff to employees compensated on a monthly basis. We believe that these individuals, not being entitled to receive a written notice of layoff under section 19540 of the Government Code, do not come within the purview of section 1453(a) of the Unemployment Insurance Code.

In other words, we are of the opinion that in the enactment of the provision for the granting of unemployment insurance compensation for state employees, the legislature did not intend to include those state employees classified as permanent intermittent such as Employment and Claims Assistants.

DECISION

The decision of the referee is modified. The claimant is not a "state employee" within the meaning of section 1453(a) of the Unemployment Insurance Code and is not eligible for benefits. Therefore, it is not necessary for us to decide whether the claim should be backdated.

Sacramento, California, October 9, 1973.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

JOHN B. WEISS

CARL A. BRITSCHGI

EWING HASS

CONCURRING IN PART)
DISSENTING IN PART) - Written Opinion Attached

DON BLEWETT

OPINION
CONCURRING IN PART
DISSENTING IN PART

I concur with my colleagues in the holding in the instant case for the claimant was not laid off nor did he terminate his employment. In fact, he was regularly employed during the weeks for which he claimed benefits. However, I cannot agree with the dictum which appears on page ten of the opinion as follows:

> "In other words, we are of the opinion that in the enactment of the provision for the granting of unemployment insurance compensation for state employees, the legislature did not intend to include those state employees classified as permanent intermittent such as Employment and Claims Assistants."

This dictum, which purports to establish a basis for the denial of benefits to all permanent intermittent employees regardless of the facts, is contrary to the Attorney General Opinion quoted and relied upon by the majority as follows:

> "This is not to say, of course, that the layoff provisions are never applicable to intermittent employment. Our conclusions here are applicable only to the precontemplated intervals occurring during the course of such employment. If such employment is finally or indefinitely terminated due, for example, to the abolition of the position, then the layoff provisions would appear to be applicable."

In my opinion we, as board members, are obligated to consider each case which comes before us on the facts of that particular case. We cannot apply the broad brush, which the majority attempts to do, and hold that permanent intermittent employees are automatically ineligible for benefits regardless of the facts.

We have a number of these cases pending before us for consideration and decision. I intend to examine the facts of each of these cases, and if I find the "layoff provisions" to be applicable I will hold the claimants to be state employees within the purview of section 1453(a) of the code.

DON BLEWETT